United States Department of Labor
Employees' Compensation Appeals Board

L.S., Appellant	)	
and	)	**Docket No. 06-1987**
	)	**Issued: January 18, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Jacksonville, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 28, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated August 9, 2006 which denied his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated February 18, 2003 to the filing of this appeal on August 28, 2006 the Board lacks jurisdiction to review the merits of this claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely.

FACTUAL HISTORY

On October 23, 2001 appellant, then a 48-year-old letter carrier, filed an occupational disease claim alleging that he developed a foot fungus, which was aggravated by his diabetes and

by inclement weather as he walked his route. He stopped work on September 28, 2000 and remained on leave without pay indefinitely.[1]

After initially denying appellant's claim, the Office developed the medical evidence and eventually accepted the claim for aggravation of bilateral chronic tinea pedis (dermatophytosis) and paid appropriate wage-loss compensation.

On September 24, 2002 the Office informed appellant that there was a conflict of opinion between his physician, Dr. Philip F. Adler, a podiatrist, and a second opinion physician, Dr. Howard Groshell, Jr., a podiatrist.[2] Dr. Adler opined that appellant was capable of walking 45 minutes per day, while Dr. Groshell found that he was capable of performing his full duties with no restrictions.

The Office arranged for a referee physician, Dr. Robert J. Grube, a Board-certified orthopedic surgeon, to examine appellant on October 25, 2002. Dr. Grube submitted a narrative report in which he detailed appellant's medical history and the results of his physical examination and found that he was fit to return to duty provided that appellant continue a treatment course with Dr. Adler and that he wear diabetic shoes while walking his routes. The report noted that appellant's "fungus involvement of the great toe nails" was likely present before he became a letter carrier. Dr. Grube also submitted a form report dated November 22, 2002, in which he found that appellant was fit to return to duty, with the restrictions that he should wear diabetic shoes and that he could not lift more than 50 to 75 pounds.

On January 14, 2003 the Office issued a notice of proposed termination of compensation. It proposed to terminate both wage-loss payments and medical treatment compensation. The notice informed appellant that he had 30 days to submit additional evidence or argument.

In a February 18, 2003 decision, the Office made final the proposed termination of appellant's wage loss and medical treatment compensation.

After the Office terminated appellant's benefits, he submitted documents from the employing establishment regarding his work status and also submitted an incomplete wage-loss claim dated January 7, 2004. On January 16, 2004 it informed appellant that his compensation had been terminated as of February 18, 2003.

On July 29, 2006 appellant requested reconsideration. He stated that the employing establishment had not called him back to work after the Office terminated his compensation and that he had experienced financial difficulties as a result. Appellant requested that the Office reopen his claim and consider it in light of Dr. Grube's October 25, 2002 letter and a disability rating decision from the Veterans Administration (VA) granting medical coverage. In support of his reconsideration request, appellant submitted the decision from the VA granting benefits for his foot condition and tinnitus.

[1] During the period in which appellant did not work for the employing establishment, the record shows that he worked intermittently for a private employer.

[2] Dr. Groshell previously examined appellant on May 14, 2002 and found that while his employment had aggravated his foot condition, appellant could work without restrictions.

On August 9, 2006 the Office issued a decision denying appellant's request for reconsideration as untimely. It found that he had not shown clear evidence of error in the Office's February 18, 2002 decision and consequently denied appellant's request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of the Federal Emlpoyees' Compensation Act[3] does not entitle a claimant to review of an Office decision as a matter of right.[4] The Office, through its regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of its implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[5] Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was erroneous on its face.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[7] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[8] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[10] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of it.[11]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value as to create a conflict in medical opinion or to establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.[12] The Board makes an independent determination of whether a claimant has submitted clear

[3] 5 U.S.C. § 8128(a).

[4] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1990).

[5] 20 C.F.R. § 10.607(a).

[6] 20 C.F.R. § 10.607(b).

[7] *Nancy Marcano*, 50 ECAB 110, 114 (1998).

[8] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[9] *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

[10] *Leona N. Travis*, *supra* note 8.

[11] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[12] *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

evidence of error on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.[13]

ANALYSIS

The Board finds that the Office properly denied appellant's request for reconsideration as untimely. The Act's implementing regulation provides that a request for reconsideration must be filed within one year from the date of the Office decision for which review is sought.[14] The most recent merit decision was the Office's February 18, 2003 decision that terminated appellant's compensation benefits. As appellant's July 29, 2006 reconsideration request was made more than one year following the Office's February 18, 2003 decision terminating his compensation, the Board finds that his request was untimely filed. Consequently, to have his claim reopened, appellant must show clear evidence of error by the Office in its February 18, 2003 decision.

As noted above, to establish clear evidence of error appellant must submit evidence that raises a substantial question as to the correctness of the Office's decision.[15] The evidence presented must be of sufficient probative value to *prima facie* shift the weight of evidence to his favor. It is not sufficient simply to present evidence that could lead a reasonable mind to a contrary conclusion. Here, appellant has failed to present evidence establishing that the Office's decision was erroneous on its face or raising a substantial question as to the correctness of the Office's decision.

With his request for reconsideration, appellant submitted a December 16, 2005 decision from the VA which granted benefits for his foot condition and for tinnitus. The decision is insufficient to shift the weight of evidence in his favor, as it does not address how any continuing condition or disability is causally related to appellant's employment. Moreover, the findings of other government agencies, while they may be instructive, are not determinative of disability under the Act.[16] Specifically, the Board has found that disability determinations by the VA do not entitle claimants to benefits under the Act.[17] Accordingly, the disability determination here is not sufficient to shift the probative weight of the evidence or demonstrate clear evidence of error in the Office's decision.

Other evidence and argument submitted by appellant after the Office terminated his benefits also does not raise a substantial question concerning the correctness of its decision. Appellant submitted documents regarding his work status and asserted that he had not asked to return to work by the employing establishment. However, this evidence and assertion does not demonstrate clear error on the part of the Office in terminating benefits in its February 18, 2003

[13] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[14] 20 C.F.R. § 10.607(a).

[15] *Darletha Coleman*, 55 ECAB 143 (2003).

[16] *See Beverly R. Jones*, 55 ECAB 411 n.14 (2004); *Daniel Deparini*, 44 ECAB 657 (1993); *George A. Johnson*, 43 ECAB 712 (1992).

[17] *James Robinson, Jr.*, 53 ECAB 417 (2002).

decision. The Board notes that the underlying issue, the termination of benefits, is medical in nature, but appellant has not submitted any additional medical evidence addressing how and why any remaining disability or condition would be employment related.

Consequently, the evidence and argument submitted on reconsideration does not shift the weight of the evidence in appellant's favor so as to demonstrate that the Office's prior decision was erroneous on its face.

CONCLUSION

The Board finds that the Office properly determined that appellant's July 29, 2006 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the August 9, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 18, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board